

UNIVERSITY
TREATISE SERIES



Fundamentals of Legal Research

TENTH EDITION

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This book is dedicated

To my parents Ruth and Irving Barkan and to my children Daniel and Davida Fernandez-Barkan

S.M.B

To the men in my life—John, Brad, and Bruce—who can always be counted on.

B.B.

To my colleagues and to my spouse, who is a colleague as well as so much more.

M.W.

Research is formalized curiosity. It is poking and prying with a purpose.

Zora Neale Hurston

Preface

Fundamentals of Legal Research has a distinguished history¹ as both a teaching tool and a guide to legal research. Those two uses serve readers' different needs, at different stages of their development. Beginning legal researchers can read the chapters and look at the illustrations of sources to pick up the basics, such as how federal statutes are published. Later, they can use the book as a reference, looking up detailed answers to specific questions. Curious students and expert researchers can mine the footnotes for sources to take them deeper into the field of legal research—for example, examining the policy issues related to state publication of statutes online, the history of law review publishing, or the effects of statutory codification.

As in the past, the chapters in *Fundamentals of Legal Research* have been ordered to reflect a “jurisprudential” approach to teaching legal research—that is, with primary law first. Since most law students begin the study of law by reading and analyzing judicial opinions, the book begins with a discussion of the process of publishing court reports and the methods for locating them. Next follow chapters on other primary sources of law, then secondary sources. *Fundamentals of Legal Research* can also be used effectively to support a “process” approach to teaching legal research in which resources are presented in the order in lawyers tend to conduct research—that is, secondary authority before primary authority. Instructors who prefer that order can begin with introductory chapters 1–3, and then cover secondary sources in chapters 16–19 before covering primary sources.²

Several chapters address research areas that most law students do not reach in their first year but may find very important to them in their second and third years and in practice. These include public international law and human rights law, the law of the United Kingdom, and federal tax research. For the first time, this volume includes a chapter on Native American tribal law research, an area that is becoming more important as tribes exercise their sovereign authority in various ways. Many law schools have added to or expanded their curricular offerings to support more in-depth study of Native American law, and *Fundamentals of Legal Research* now supports that study.

Assignments to Accompany Fundamentals of Legal Research, 10th and *Legal Research Illustrated, 10th* is available as a separate pamphlet. These assignments, produced by Professor Susan T. Phillips of the Texas A&M University School of Law, are designed to help students understand the resources described in this book.

¹ The history began with ERVIN POLLACK, *FUNDAMENTALS OF LEGAL RESEARCH* (1956). Although labeled the tenth edition, the present volume could be considered the fourteenth. The numbering of editions was reinitiated in 1977 with a change in authorship. For a history of this and other legal research textbooks, see Steven M. Barkan, *On Describing Legal Research*, 80 MICH. L. REV. 925 (1982) (reviewing J. MYRON JACOBSTEIN & ROY M. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* (2d ed. 1981)).

² For a dialogue on the two approaches, see Donald J. Dunn, *Why We Should Teach Primary Sources First*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 10 (1999); Penny A. Hazelton, *Why Don't We Teach Secondary Sources First?*, 8 PERSP.: TEACHING LEGAL RES. & WRITING 8 (1999).

Legal research changes, as landforms do, by different processes and at different rates. Some changes are fairly minor, as when the wind creates shifting patterns on the surface of the sand—for instance, when the U.S. Government Printing Office began releasing the 2012 edition of the *United States Code*, there was little that someone familiar with the 2006 edition needed to learn in order to use it effectively. Other changes require some addition to our knowledge, as when a familiar source becomes available on an online platform; think of a river that carves a new channel while the original channel remains. But when familiar sources cease to exist or totally new platforms are introduced, it sometimes feels as though the legal research landscape has been affected by an earthquake that shifts the ground we stand on or a volcano that creates totally new features. We don't want to carry this metaphor too far—we believe that many of the changes we see in legal research are salutary, not cataclysmic—but the field is dynamic and the resources used to teach it must also change.

The changes in the legal research landscape have been and will continue to be dramatic. Here are a few changes since the prior edition of *Fundamentals*. Industry giants *Westlaw* and *LexisNexis* restructured their search interfaces, creating *WestlawNext* and *Lexis Advance*.³ *Bloomberg Law* made a strong entrance into the law school market. The Government Printing Office revamped and expanded its website, introducing *FDsys*. After twenty years of developing the very useful *THOMAS*, the Library of Congress replaced it with *Congress.gov*. And, although many researchers won't be as astonished as we were, the IRS stopped compiling the *Cumulative Bulletin*. Oh, and Scotland nearly left the United Kingdom, a move that would have changed the research in the law of those nations in multiple ways.

This book is the work of many hands, including the authors and contributors from all the past editions. In 2011, more than 18 contributors reviewed all the chapters of the ninth edition. (See the Acknowledgements for a list.) Many of them had been involved with one or more earlier editions. Beginning in 2013, we went over every chapter, reviewing and revising the content and style of each. Information in this volume is generally current as of late 2013 or early 2014.

Our goal was to make the content useful to contemporary readers who are familiar with online tools (and indeed prefer them) while also covering print resources sufficiently to ground students in the structure of legal authority and provide a useful reference for those needing information about print legal materials. Some of our changes were minor, likely to be noticed only by someone who carefully compares this edition with the last. Others are greater. Although we pondered whether it was necessary to have a separate chapter on electronic legal research when electronic sources are discussed throughout the book, we decided instead to revise it substantially. The chapter now has few specifics about *LexisNexis* and *Westlaw* and offers analysis and commentary to help even digital natives be more thoughtful about online research. The citators chapter now only briefly mentions *Shepard's Citations* in print, and focuses on online citators. In recognition that what we have long called “looseleaf services” are no longer printed on single sheets of paper (i.e., loose leaves) and are widely available, often only available, electronically, we

³ Between the time we sent the manuscript to the publisher and the first page proofs, the *Lexis Advance* interface was reshaped. What we say about the system—its content, the general method of searching—is still valid, even though the look of screens has changed. For the details of how to navigate any given system, we invite readers to use help screens and attend training. This book is offering a broader view.

have used the term “topical services” to describe this resource. This edition of *Fundamentals*, like a new map, reflects changes in the landscape.

A note about our citations: In general we follow *The Bluebook: A Uniform System of Citation* (19th ed. 2010), with three chief exceptions. First, we often provide publishers’ names when we are listing works in the text. Second, we do not provide the dates we visited the many websites we cite. Most were visited during the process of editing and revision during the fall of 2013 and early 2014. Finally, we cite the *Bluebook* itself so often that we shorten its citation. A full citation to the *Bluebook* in a footnote would be:

THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.4(e), at 50 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).⁴

This is cumbersome for a book that so often cites the *Bluebook*. We usually shorten *Bluebook* references to:

BLUEBOOK R. 1.4(e), at 50.

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⁴ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.8(c)(v), at 145 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

Acknowledgments

For over 50 years, *Fundamentals of Legal Research* has been a work-in-progress. This edition builds on the work of Professors Ervin H. Pollack, J. Myron Jacobstein, Roy M. Mersky, Donald J. Dunn, and numerous contributing authors. Along with the primary and contributing authors, the law library staffs at Ohio State, Stanford, Texas, Western New England, Washington, and Wisconsin have supported the research and development of this book.

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Melissa Bernstein, Library Director & Professor of Law, S.J. Quinney Law Library, University of Utah (Chapters 16, 17, 19).

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Fundamentals of Legal Research is a book for students learning to do legal research. Therefore, we thank and acknowledge law librarians and all teachers of legal research, both in and out of the classroom. Their efforts to teach law students and lawyers how to find the information upon which legal decisions are made contribute to the betterment of our legal system. Their suggestions and feedback for improving this book will always be appreciated.

Finally, we thank all of the law students who read and use the book and who continue to sustain our intellectual interests and curiosity. We are gratified when lawyers indicate that the book they used in their first-year legal research class or in an advanced course in legal research is still in their personal library, and that they continue referring to it. Ultimately, we are grateful for having the opportunity to make our contributions to the body of legal literature.

Glossary of Terms Used in Legal Research*

This glossary is limited in scope, and the definitions of words are restricted in meaning, to a legal or legal research context. Words such as “index,” whose meanings conform to general usage and are obvious, are omitted.

ACQUITTAL—

the verdict in a criminal trial in which the defendant is found not guilty.

ACT—

an alternative name for statutory law. When introduced in a legislature, a piece of proposed legislation is typically described as a “bill.” After a bill is enacted, the terms “law” and “act” may be used interchangeably to describe it. An act has the same legislative force as a joint resolution but is technically distinguishable, being of a different form and introduced with the words “Be it enacted” instead of “Be it resolved.”

ACTION—

the formal legal demand of one’s rights from another person brought in court.

ADJUDICATION—

the formal pronouncing or recording of a judgment or decree by a court.

ADMINISTRATIVE AGENCY—

a governmental authority, other than a legislature or court, which issues rules and regulations or adjudicates disputes arising under designated statutes and regulations. Administrative agencies usually act under authority delegated by the legislature.

ADMINISTRATIVE LAW—

law that governs, or is promulgated by, governmental administrative agencies other than courts or legislative bodies. These administrative agencies derive their power from legislative enactments and are subject to judicial review.

ADVANCE SHEETS—

current pamphlets containing the most recently reported opinions of a court or the courts of several jurisdictions. The volume and page numbers usually are the same as in the subsequently bound volumes of the series, which cover several of the previously issued advance sheets.

ADVISORY OPINION—

an opinion rendered by a court at the request of the government or an interested party that indicates how the court would likely rule on a matter should adversary litigation develop. An advisory opinion is thus an interpretation of the law without binding effect.

* This glossary was revised by David McClure, Head of Research and Curriculum Services, Wiener-Rogers Law Library, William S. Boyd School of Law, University of Nevada, Las Vegas.

The International Court of Justice and some state courts will render advisory opinions; the Supreme Court of the United States and other federal courts will not.

AFFIDAVIT—

a written statement or declaration of facts sworn to by the maker, taken before a person officially permitted by law to administer oaths.

ALTERNATIVE DISPUTE RESOLUTION—

the process of resolving disputes through such means as mediation or arbitration rather than through litigation.

AMICUS CURIAE—

literally, “friend of the court.” A person or entity with strong interest in or views on the subject matter of a dispute involving other parties that petitions the court for permission to file a brief in the case, ostensibly on behalf of one of the parties, but actually to suggest a rationale consistent with its own views.

ANNOTATIONS—

(1) brief summaries of the law and facts of cases interpreting statutes passed by Congress or state legislatures that are compiled in codes (i.e., in annotated codes); or (2) expository essays of varying length on significant legal topics chosen from selected cases or statutes, chiefly in the series of *American Law Reports*.

ANSWER—

the pleading filed by the defendant in response to the plaintiff’s complaint.

APPEAL PAPERS—

the record of lower court proceedings and briefs filed by attorneys with courts for the purpose of appealing a lower court’s actions in a litigated matter.

APPELLANT—

the party who requests that a higher court review the actions of a lower court. Compare with APPELLEE.

APPELLATE COURT—

a court that has legal authority to review the actions and decisions of a lower court or an administrative agency on appeal.

APPELLEE—

the party against whom an appeal is taken (usually, but not always, the winner in the lower court). It should be noted that a party’s status as appellant or appellee bears no relation to his, her or its status as plaintiff or defendant in the lower court. Sometimes termed “respondent.”

ARBITRATION—

the hearing and settlement of a dispute between opposing parties by one or more neutral and non-judicial third parties. The third party’s decision is often binding by prior agreement of the opposing parties. Arbitration is an alternative to litigation as a means of resolving disputes.

ATTORNEY GENERAL OPINION—

an opinion issued by the chief counsel of the federal or state government at the request of the president, governor, or other governmental official on behalf of an agency, interpreting the law for the requesting official or agency in the same manner as a private attorney would for his or her client. The opinion is not binding on a court but is usually accorded some degree of persuasive authority.

AUTHORITY—

that which can bind or influence a court. Case law, legislation, constitutions, administrative regulations, and writings about the law are all legal authority. See PRIMARY AUTHORITY; MANDATORY AUTHORITY; PERSUASIVE AUTHORITY.

BILL—

a legislative proposal introduced in a legislature. The term distinguishes unfinished legislation from enacted law.

BLACK LETTER LAW—

an informal term indicating the basic principles of law generally accepted by the courts and/or embodied in the statutes of a particular jurisdiction.

BOOLEAN LOGIC—

a form of search strategy used in many databases, such as *Westlaw* and *LexisNexis*. In a Boolean search, connectors such as AND, OR, and NOT are used to construct a complex search command. The search “fungible and gasoline” for example, retrieves documents in which the term “fungible” and the term “gasoline” both appear. Compare with NATURAL LANGUAGE.

BRIEF—

(1) in American law practice, a written statement prepared by the counsel arguing a case in court. It contains a summary of the facts of the case, the pertinent laws, and an argument of how the law applies to the facts supporting counsel’s position; (2) a summary of a published legal opinion prepared for the purpose of studying the opinion in law school.

BRIEFS AND RECORDS—

See APPEAL PAPERS.

CALENDAR—

a list or schedule that states the order in which cases are to be heard during a term of court.

CALR—

an acronym for Computer-Assisted Legal Research. *Bloomberg Law*, *Fastcase*, *Casemaker*, *LexisNexis*, *Loislaw*, *Westlaw*, and *VersusLaw* are examples of CALR services.

CAPTION—

See STYLE OF A CASE.

CASE IN POINT—

a judicial opinion which deals with a fact situation similar to the one being researched and substantiates a point of law to be asserted. It is also referred to as “case on all fours.”

CASE LAW—

the law of reported judicial opinions as distinguished from statutes or administrative law.

CASEBOOK—

a textbook used to instruct law students in a particular area of law. The text consists of a collection of judicial opinions, usually from appellate courts, and notes by the author(s).

CAUSE OF ACTION—

a claim in law and in fact sufficient to bring a case to court; the grounds of an action. (Example: breach of contract.)

CERTIORARI—

a writ issued by a higher court to a lower court requiring the latter to produce the records of a particular case tried therein. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear. The term’s origin is Latin, meaning “to be informed of.”

CHARTER—

a document issued by a governmental entity that gives a corporation legal existence. A corporation’s charter may be referred to as the “articles of incorporation” or the “certificate of incorporation,” depending on the terminology used in the state where the corporation was incorporated.

CITATION—

a reference to an authority. Citations to authority and supporting references are both important and extensive in any form of legal writing. Citation form—as prescribed by a manual such as the *Bluebook* or the *ALWD Citation Manual*—is also given emphasis in legal writing.

CITATORS—

books or online services that provide the subsequent judicial history and interpretation of reported cases or lists of cases and legislative enactments construing, applying, or affecting statutes. Citators indicate where a specific source (cited source) is cited by another source (citing source). In the United States, the most widely used citators are *Shepard’s* and *KeyCite*.

CITED CASE—

a case that is referred to by other cases.

CITING CASE—

the case that refers to the cited case.

CIVIL LAW—

(1) Roman law embodied in the Code of Justinian, which is the basis of law in most Latin American countries and most countries of Western Europe other than Great Britain and is the foundation of the law of Louisiana and Quebec; (2) the law concerning noncriminal matters in both common law and civil law jurisdictions, such as those described in (1).

CLAIM—

(1) the assertion of a right, as to money or property; (2) the accumulation of facts that give rise to a right enforceable in court.

CLASS ACTION—

a lawsuit brought by a representative party on behalf of a group, all of whose members have the same or a similar grievance against the defendant.

CODE—

a compilation of statutory laws or regulations. In a code, the current laws are rewritten and arranged in classified order by subject. Repealed and temporary acts are eliminated and the revision is reenacted. See also COMPILED STATUTES; CONSOLIDATED STATUTES; REVISED STATUTES.

CODIFICATION—

the process of collecting and arranging systematically, usually by subject, the laws of a state or country.

COMMON LAW—

the basis of the Anglo-American legal systems. In theory, the common law courts did not create law but rather discovered it in the customs and habits of the English people. English common law was largely customary, unwritten law until discovered, applied, and reported by the courts of law. The strength of the English judicial system in pre-parliamentary days is one reason for the continued emphasis in common law systems on case law. In a narrow sense, common law is the phrase sometimes used to distinguish case law from statutory law.

COMPILED STATUTES—

in popular usage, a code. Technically, it is a compilation of acts printed verbatim as originally enacted but in a new classified order. The text is not modified; however, repealed and temporary acts are omitted. See also CODE; CONSOLIDATED STATUTES; REVISED STATUTES.

COMPLAINT—

the plaintiff's initial pleading. In general, a complaint need only contain a short and plain statement of the claim upon which relief is sought, an indication of the type of relief requested, and an indication that the court has jurisdiction to hear the case.

CONNECTOR—

See BOOLEAN LOGIC.

CONSOLIDATED STATUTES—

a compilation of statutes arranged in classified order by subject and subdivided as necessary into parts, articles, chapters, and sections for clarity and consistency of style. In the process of preparing consolidated statutes, all temporary and repealed statutes are deleted. A collection of statutes is sometimes referred to in popular usage as “consolidated laws,” “compiled statutes,” “revised statutes,” or a “code.” See also CODE; COMPILED STATUTES; REVISED STATUTES.

CONSOLIDATING STATUTE—

a law that gathers various statutes on a certain topic and organizes them into a single statutory act, making minor textual revisions and eliminating repealed and temporary acts in the process.

CONSTITUTION—

the system of fundamental principles by which a political body or organization governs itself. Most national constitutions are written; the constitutions of Israel, the United Kingdom, and New Zealand are unwritten.

COUNT—

a separate and independent claim. A civil complaint or a criminal indictment may contain several counts.

COUNTERCLAIM—

a claim made by a defendant against a plaintiff in a civil lawsuit; it constitutes a separate cause of action.

COURT DECISION—

the disposition of a case by a court. See OPINION.

COURT RULES—

rules of procedure promulgated to govern civil, criminal, and appellate practice before the courts.

DAMAGES—

monetary compensation awarded by a court for an injury caused by the act of another. Damages may be actual or compensatory (equal to the amount of loss shown), exemplary or punitive (in excess of the actual loss given to punish the person for the malicious conduct that caused the injury), or nominal (a trivial amount given because the injury is slight or because the exact amount of injury has not been determined satisfactorily).

DATABASE—

a collection of information organized for retrieval by computer. In legal research, it usually refers to a commercial service that may be searched online. A full-text database provides the complete text of documents such as judicial opinions or newspaper articles. *Westlaw* and *LexisNexis* are full-text databases for cases, statutes, and many other resources. A bibliographic database provides citations or abstracts of articles, books, reports, or patents.

DECISION—

See COURT DECISION.

DECREE—

a determination by a court of the rights and duties of the parties before it. Formerly, decrees were issued by courts of equity and distinguished from judgments, which were issued by courts of law. See EQUITY.

DEFENDANT—

the person against whom a civil or criminal action is brought.

DEMURRER—

a means of objecting to the sufficiency in law of a pleading by admitting the actual allegations made, but disputing that they frame an adequate legal claim. A demurrer is more commonly referred to in most jurisdictions today as a “motion to dismiss for failure to state a claim.”

DICTUM, DICTA—

See OBITER DICTUM.

DIGEST—

an index to reported cases, providing brief, unconnected statements of court holdings on points of law, which are arranged by subject and subdivided by jurisdiction and courts.

DOCKET NUMBER—

an identifying number, sequentially assigned by the court clerk at the outset of a lawsuit submitted to the court for adjudication.

EN BANC—

a session in which the entire bench of the court participates in the decision rather than the regular quorum. In the United States, each federal circuit court of appeals usually sits in groups of three judges but for important cases may expand the bench to include all circuit judges in regular active service for that circuit, which can range from six to twenty-nine judges. In such instances, the court is said to be “sitting en banc.”

ENCYCLOPEDIA—

a work containing expository statements on principles of law, topically arranged, with supporting footnote references to cases and statutes on point.

EQUITY—

justice administered according to fairness as contrasted with strict adherence to the common law or statutes. Equity is based on a system of rules and principles that originated in England as an alternative to the harsh rules of common law and that were based on what was fair in a particular situation. One sought relief under this system in courts of equity rather than in courts of law.

EXECUTIVE AGREEMENT—

an international agreement, not a treaty, concluded by the president on the president's authority as commander-in-chief and director of foreign relations. An executive